

(2)
No. 86-1290

Supreme Court, U.S.
FILED
MAR 7 1987
JOSEPH F. SPANIOLO, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1986

CHARLOTTE LOUISE WILSON, individually, and as
Personal Representative of the Estate of Darold Floyd
Wilson, etc., and GAIL L. CLAY, individually, and as
Personal Representative of the Estate of Norman Lee
Clay, etc.,

Petitioners,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY,
a corporation,

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS**

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did the United States Court of Appeals for the Tenth Circuit err when it determined that prejudgment interest should not be awarded in this Federal Employers' Liability Act case where Petitioner failed to present testimony, instructions, or interrogatories on the issue, and where all circuits which have decided the issue are in accord with this holding of the Tenth Circuit?

LIST OF PARTIES

The only parties are those listed in the caption. Burlington Northern Railroad Company is a subsidiary of Burlington Northern, Inc. which has the following other subsidiaries:

- BN Financial Service Inc.
- BN Geothermal Inc.
- BN Leasing Inc.
- Burlington Northern Foundation
- Burlington Northern International Services Inc.
- Burlington Northern Motor Carriers Inc.
- Burlington Northern Overseas Finance Company, N.V.
- CBR Distribution Corporation
- Colt Intermodal Inc.
- Glacier Park Company
- Glacier Park Liquidating Company
- Meridian Minerals Company
- M-R Holdings
- National Exchange, Inc.
- New Mexico and Arizona Land Company
- Plumb Creek Timber Company, Inc.
- Research Applications Inc.
- The El Paso Company

Burlington Northern Railroad Company has an interest in the following companies:

- The Belt Railway Company of Chicago
- Burlington Northern Dock Corporation
- Burlington Northern (Manitoba) Limited
- Burlington Northern Railroad Properties Inc.
- Camas Prairie Railroad Company
- Clarkland Royalty, Inc.
- Davenport, Rock Island and North Western Railway Company
- The Denver Union Terminal Railway Company
- Houston Belt & Terminal Railway Company
- Iowa Transfer Railway Company
- Kansas City Terminal Railway Company

Keokuk Union Depot Company
The Lake Superior Terminal and
Transfer Railway Company
Longview Switching Company
The Minnesota Transfer Railway Company
Paducah & Illinois Railway Company
Portland Terminal Railroad Company
The Saint Paul Union Depot Company
Terminal Railroad Association of St. Louis
Trailer Train Company
Western Fruit Express Company
The Wichita Union Terminal Railway Company
Winona Bridge Railway Company
Northern Radio Ltd.

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Respondent.

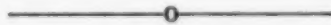
**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS**

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Burlington Northern Railroad Company, respectfully requests this Court to deny the Petition for Writ of Certiorari of Charlotte Louise Wilson and Gail L. Clay seeking review of the decision of the United States Court of Appeals for the Tenth Circuit. That opinion is set forth in its entirety as Appendix B to the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

The Petitioner, Gail L. Clay, who was a plaintiff in the trial court, sought prejudgment interest in her Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, suit only after verdict by filing a post-trial motion. Petitioner had offered no proof of actual economic loss of interest on income lost to the time of trial, nor did she request jury instructions or special interrogatories to the jury in an effort to segregate past economic loss from future economic loss or from pain and suffering. Thus, as Judge McKay notes in his concurring opinion, "Since we are here faced with a general verdict not properly segregated into its component parts, that task [of assessing and calculating prejudgment interest] is now impossible." *Opinion* Appendix B to Petitioners' Petition for Writ of Certiorari, p. 13a.



ARGUMENT: REASONS FOR DENYING THE WRIT

Petitioner failed to protect the record on the trial level and only sought prejudgment interest as an afterthought without any basis for the award in the proofs or in the verdict.

Petitioner claims no conflict among the circuits, nor is there such a conflict on the issue of the award of prejudgment interest in Federal Employers' Liability Act cases. Not one circuit in the 78-year history of the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, has ever approved the award of prejudgment interest in such a case.

I. At Trial the Petitioner Offered No Evidence, Requested No Instruction from the Court and Proffered No Suggested Interrogatories to the Jury on the Issue of Prejudgment Interest.

Even if prejudgment interest constituted a conceded part of an award in a Federal Employers' Liability action, it is clear that the only interest actually lost by a plaintiff would be that which was foregone on lost income or money spent from the date of loss to the time of compensation. *Opinion*, Appendix B to Petitioners' Petition, p. 10a. Future losses entail no economic deprivation of interest by definition since the actual loss has not yet been incurred. Therefore, segregation of any award would be necessary to ascertain specific elements of past economic loss, past loss for pain and suffering, future economic loss, and future loss for pain and suffering. Without such segregation by Answers to Special Jury Interrogatories based on competent evidence and explained in the trial court's instruction, calculation of any actual economic loss of use of money until the time of compensation is literally impossible.

Petitioner failed to offer any evidence on the subject, tendered no relevant jury instruction, and proffered no special interrogatories. Therefore, the Court was without any record upon which to base an award of prejudgment interest even if such an award was warranted.

II. There Is No Conflict Among the Circuit Courts Which Have Uniformly Denied the Recovery of Prejudgment Interest in Suits Arising Under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60.

Not one circuit in the 78-year history of the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, has ever ap-

proved the award of prejudgment interest. Those circuits which have considered the issue have been in accord with the Tenth Circuit's denial of prejudgment interest, *e.g.*, *Faulkenberry v. Louisiana Arkansas R.R.*, 551 F.2d 650 (5th Cir. 1977); *Kozar v. C.O.R.R.*, 449 F.2d 1238 (6th Cir. 1971); *Briggs v. Pennsylvania R. Co.*, 164 F.2d 21 (2d Cir. 1947); *aff'd on other grounds*, 334 U.S. 304 (1948); *Louisiana Arkansas Ry. Co. v. Pratt*, 142 F.2d 847, 848 (5th Cir. 1944); *Chicago, Milwaukee, St. Paul Pacific Ry. Co. v. Busby*, 41 F.2d 617, 619 (9th Cir. 1930).

CONCLUSION

Where the circuits are in agreement with the Tenth Circuit's decision that prejudgment interest is inappropriate in a Federal Employers' Liability Act case, and where Petitioner failed to preserve the requisite record at trial, this issue does not merit this Court's consideration.

Respectfully submitted,

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